UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC., Employer,	)	
and	)	Case 7-RC-22141
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, Petitioner.	)	
BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER, Employer,	)	
and	)	Cases 18-RC-16415 18-RC-16416
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, Petitioner.	)	
CROFT METALS, INC., Employer,	)	
and	)	Case 15-RC-8393
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, Petitioner.	)	

AMICUS CURIE BRIEF OF AMERICAN RIVER TRANSPORTATION COMPANY

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The American River Transportation Company ("ARTCO"), by its attorneys and pursuant to the Notice and Invitation to File Briefs issued by the National Labor Relations Board (the "Board") on July 25, 2003, hereby files this amicus curie brief in regard to the above-captioned cases.

I. INTRODUCTION

On June 25, 2003, the Board invited all parties and interested amici to file briefs addressing the supervisory status of the employees at issue in three cases where the Board has granted review – Oakwood Heathcare, Inc., Case 7-RC-22141; Golden Crest Heathcare Center, Cases 18-RC-16415 and 18-RC-16416; and Croft Metals, Inc., Case 15-RC-8393. The reason for this invitation is so that the Board can address the supervisory status of these individuals in light of the Supreme Court's decision in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). The Board has listed ten questions which parties and interested amici may address in their briefs. These questions are:

1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? In particular, what is "the degree of discretion required for supervisory status," (i.e., "what scope of discretion qualifies"? What definition, test, or factors should the Board consider in applying the term "independent judgment")?

2. What is the difference, if any, between the terms "assign" and "direct" as used in Sec. 2(11) of the Act?

3. What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?

4. What is the distinction between directing "the manner of others' performance of discrete tasks" and directing "other employees"?

5. Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? What is the distinction between a supervisor's "independent judgment" under Sec. 2(11) of the Act and a professional employee's "discretion and judgment" under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?

6. What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?

7. What, if any, difference does it make that persons in a classification rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?

8. To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams?

9. What functions or authority would distinguish between "straw bosses, leadmen, set-up men, and other minor supervisory employees," whom Congress intended to include within the Act's protections, and "the supervisory vested with 'genuine management prerogatives'"?

10. To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work, etc. – in determining supervisory status?

In light of the Supreme Court's decision in Kentucky River, ARTCO respectfully requests the Board to adhere to the spirit of the Supreme Court's decision and to overrule Board cases, such as Mississippi Power & Light Co., 328 NLRB 965 (1999), which were based on prior limitations of "independent judgment" and to give a broader definition of what constitutes "independent judgment."

II. ARGUMENT

A. The Language of the Statute and Legislative History Espouses A Broader Definition of "Supervisor" Than The Board Has Historically Found

1. Statutory Definition of "Supervisor"

The National Labor Relations Act (the "Act") expressly defines the term "supervisor" in Section 2(11), which provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152 (11) (2000). Under the Act, therefore, individuals are supervisors if:

(1) "they hold the authority to engage in any one of the twelve listed supervisory functions" (either to act or effectively to recommend such action);

(2) "their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment'"; and

(3) "their authority is held 'in the interest of the employer.'"

See Kenneth R. Dolin, *The Supreme Court's Rejection of Excluding "Ordinary Professional or Technical Judgment" as Independent Judgment when Directing Employees: Does* Kentucky River *Mean Lights Out for* Mississippi Power*?* 18 Lab. Law. 365, 366 (2003) [hereinafter Dolin] (quoting Kentucky River, 532 U.S. at 713). These three tests are separate and so must all be present. Id. (citing NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 574 (1994)).

2. Legislative History of the Term "Supervisor"

The Act originally passed by Congress in 1935 did not contain any reference to supervisors. Id. (citing Kentucky River, 532 U.S. at 717-18). "It extended to 'employees' the 'right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . .'" and "defined 'employee' expansively (if circularly) to 'include any employee.'" Id. (quoting Kentucky River, at 717-18).

It was not until the Taft-Hartley amendments were passed in 1947 that supervisors were mentioned in the Act. Id. The Labor Management Relation Act of 1947 (Taft-Hartley Act) expressly excluded "supervisors" from the definition of "employees" and thereby from the protection of the Act. Id. (citing 29 U.S.C. § 1649(a) (2000)).

"Well before the Taft-Hartley Act added the term 'supervisor' to the Act, however, the Board had already been defining it." Kentucky River, 532 U.S. at 718. "[W]hile the Board agreed that supervisors were protected by the 1935 Act, it also determined that they should not be placed in the same bargaining unit as the employees they oversaw." Id. In distinguishing supervisory and non-supervisory employees, "the Board defined 'supervisors' as employees who

'supervise or direct the work of [other] employees'... *and* who have the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees." See Dolin at 366 (quoting Kentucky River, 532 U.S. at 718). This was a true conjunctive test: "The Board consistently held that employees whose only supervisory function was directing the work of other employees were not 'supervisors' within its test." Id. at 366-67.

In 1947, the Supreme Court in Packard Motor Car Co. v. NLRB, 330 U.S. 487, 490 (1947), held that supervisors were protected by the Act, reasoning that "it is for Congress, not for us, to create exceptions or qualifications at odds with [the Act's] plain terms." See Dolin at 367.

Congress, in response to Packard Motor, added to the Act the exemption that the Supreme Court had found lacking. Id. (citing Kentucky River, 532 U.S. at 717). "The Labor Management Relations Act of 1947 (Taft-Hartley Act) expressly excluded 'supervisors' from the definition of 'employees' and thereby from the protections of the Act." Kentucky River at 718. "This exclusion was intended ... to improve the competitive position of industry by giving management [undivided loyalty from its] 'faithful agents' and to free supervisors from 'the leveling processes of seniority, uniformity, and standardization' that characterized unions." See Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713 (1981) [Hereinafter Note] (citing H.R. Rep. No. 93-245 (1947), reprinted in 1947 U.S.S.C.A.N. 136, 137, reprinted in NLRB, Legislative History of the Labor Management Relations Act, 1947 at 307, 308 (1985) [Hereinafter Legislative History]).

"When the Taft-Hartley Act added the term 'supervisor' to the Act in 1947, it largely borrowed the Board's definition of the term, with one notable exception: [while] the Board required a supervisor to direct the work of other employees and perform another listed function, the [Taft-Hartley] Act permitted [responsible] direction alone to suffice." See Dolin at 367 (quoting Kentucky

River, 532 U.S. at 719). Put another way, the Taft-Hartley Act replaced the *conjunctive* test that the Board had used with a *disjunctive* test. Id.

Congress added the phrase "responsibly to direct" to the enumeration of supervisory powers because, in the words of Senator Flanders:

> [U]nder some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a larger responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instruction for its proper performance. If needed, he gives training to the performance of unfamiliar tasks to the workers to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees . . . ." Their essential managerial duties are best defined by the words, "direct responsibly" . . . .

See Legislative History at 1303. Thus, the legislative history of the term "supervisor" shows that a person who responsibly directs others and exercises personal judgment based on personal experience, training, and ability is not a mere lead man or straw boss. Rather, that person is a supervisor. See Dolin at 368.

As the Supreme Court recognized in Kentucky River, it was the Taft-Hartley Act's replacement of the Board's conjunctive test (responsibly to direct and another supervisory function) with a disjunctive test (responsibly to direct or any other supervisory function) "that has pushed the Board into a running struggle to limit the impact of 'responsibly to direct' on the number of employees qualifying for supervisory status – presumably driven by the policy concern that otherwise the proper balance of labor-management power will be disrupted." Id. (quoting Kentucky River, 532 U.S. at 719).

B. The Board's Application of the Term "Supervisor" Has Been Inconsistent In Contravention of the Clear Statutory Language and Judicial Authority.

"Despite the unambiguous origins of the exclusion, the definition of supervisor has spawned an immense amount of litigation, generating controversy in hundreds of cases before courts and thousands of cases before the ... [Board]." Note at 1713. Indeed, a commentary in 1981 found that the Board had inconsistently applied the definition and identified a pattern in those Board decisions, namely that the results varied according to the context of the underlying litigation. See Dolin at 368 (citing Note at 1713-27). "In unfair labor practice cases, borderline individuals [were] found to be supervisors when that determination [had] the effect of attributing liability to an employer for an individual's action (attribution cases). In contrast, borderline individuals [were] found to be employees when that determination protects them from an employer's sanction (sanction cases)." Note at 1719. The pattern was further described as the Board applying the definition of supervisor that most widens the coverage of the Act, and maximizes both the number of unfair labor practice findings it makes and the number of unions it certifies. See Dolin at 368 (citing Note at 1720).

Likewise, "many courts have expressed an unwillingness to defer to the Board's interpretation of Section 2(11), [because] that agency's 'manipulation of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings.'" See, e.g., Mississippi Power, 328 N.L.R.B. 965, 982 n.28, citing NLRB v. Attleboro Assoc. Ltd., 176 F.3d 154 (3d Cir. 1999); Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 492 (2d Cir. 1997) (criticizing the Board for its "biased mishandling of cases involving supervisors" and its "willingness to twist and ignore evidence in an effort to reach a preferred result"); NLRB v. Winnebago Television Corp., 75 F.3d 1208, 1214 (7th Cir. 1996) ("the NLRB's manipulation of the definition provided in [Section 2(11)] has earned it little deference"); and Schnuck Markets, Inc. v. NLRB, 961 F.2d 700, 704 (8th

Cir. 1992). See also Beverly Enters., Virginia, Inc. v. NLRB, 165 F.3d 290, 295 (4th Cir. 1999) ("In applying the definition of supervisor . . . the Board has, we believe, manifested an irrational inconsistency."); Caremore Inc. v. NLRB, 129 F.3d 365, 371 (6th Cir. 1997) (inviting the employer to petition for recovery of its costs and fees because "the NLRB continues to misapprehend both the law and its own place in the legal system"). See generally, Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719 (7th Cir. 2000); Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273 (D.C. Cir. 2001).

1. "Patient Care" Analysis

The supervisory status issue has been especially difficult for the Board when professional or technical employees are involved, particularly in the health care industry. "Nurses at times must make immediate life-or-death decisions involving critically ill patients, and in so doing, may instruct others, including other nurses, about what needs to be done." See Dolin at 369 (quoting Providence Hospital, 320 NLRB 717, 725 (1996), enforced sub nom., 121 F.3d 548 (9th Cir. 1997)). According to the Board, "the possibility that severe consequences might flow from a professional's misjudgment [did] not necessarily make [the] judgment supervisory"; critical judgment, it said, was "the quintessence of professionalism." Id. (quoting Providence Hospital at 725-26).

It was largely in response to these factors that the Board developed its so-called "patient care analysis," whereby a charge nurse's assignment and direction of other employees did not involve the exercise of supervisory authority when it stemmed from the charge nurse's professional (or in the case of an LPN, technical) judgment in the interest of patient care and, therefore, was found not "in the interest of the employer." Id. (citing Providence Hospital at 726). According to the Board, the direction of employees to provide patient care derived from a nurse's professional or technical status, not from the nurse's supervisory status. Therefore, in such

situations, the nurse was acting in the interest of a patient and not in the interest of its employer. Id. The patient care analysis was thus a tool designed to distinguish judgment exercised by all nurses due to their professional or technical training and the exercise of independent judgment by a supervisor. Id. This test, however, was found inconsistent with the statute by the Sixth Circuit and was ultimately rejected by the Supreme Court in NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994).

In NLRB v. Health Care & Retirement Corp. of America, the Supreme Court found the Board's interpretation of part three of the supervisory test ("in the interest of the employer") "inconsistent with . . . the statutory language", because it read "the responsible direction portion of Section 2(11) out of the statute in nurse cases." Id. at 579-80. The Board there did not challenge the proposition that the nurses exercised powers under Section 2(11), nor did it argue that the nurses lacked independent judgment in this regard. Rather, the Board had argued simply that "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, [was] not authority exercised 'in the interest of the employer' because a nurse's supervisory activity is not exercised in the interest of the employer if it is incidental to the treatment of patients." See Dolin at 370 (citing Health Care at 576).

The Supreme Court rejected the Board's "patient care" test. Id. (citing Health Care at 577-78). As the Court pointed out, "the Board [had] created a false dichotomy . . . between acts taken in connection with patient care and acts taken in the interest of the employer." Id. (citing Health Care at 577). The Court said "that dichotomy makes no sense." Id. (citing Health Care at 577). The Court reasoned, "patient care is the business of a nursing home and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." Id. (citing Health Care at 577). As the Sixth Circuit had earlier

recognized, "the notion that direction given to subordinate personnel to ensure that the employer's nursing home customers receive 'quality care' somehow fails to qualify as direction given 'in the interest of the employer' makes very little sense to us." Id. (quoting Beverly California Corp. v. NLRB, 970 F.2d 1548, 1553 (6th Cir. 1992)). The Supreme Court also found that the Board's test rendered portions of the statutory definition of Section 2(11) meaningless because, under the Board's test, a nurse who uses independent judgment to engage in responsible direction of other employees is not a supervisor. Id. (citing Health Care, 511 U.S. at 578-79). The Supreme Court found "no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer." Id. (citing Health Care at 577-78).

Thus, the Board was unsuccessful in using its "patient care analysis" to manipulate the phrase "in the interest of the employer" to find those nurses who used independent judgment to responsibly direct other employees were nevertheless not supervisors. Id. But undaunted, the Board next sought to achieve the same result for those nurses and others who used significant judgment to responsibly direct other employees through its interpretation of the phrase "independent judgment." Id.

2. Post-Health Care: The Board Places Restrictions Upon Independent Judgment as to the "Responsibly To Direct" Function

Three decisions illustrate the Board's post-Health Care analysis of placing restrictions upon independent judgment: Providence Hospital, Ten Broeck Commons, and Mississippi Power.

a. Providence Hospital

In Providence Hospital, the Board majority concluded that the charge nurses at issue were not supervisors because, inter alia, their direction of employees did not require the use of "independent judgment" within the meaning of the Act. 320 NLRB 717, 733, enforced sub nom.,

121 F.3d 548 (9th Cir. 1997). According to the Board majority, the judgment exercised by the RNs in directing less-skilled employees to deliver services was not "independent" because it was based on professional or technical skill or experience. See Dolin at 371 (citing Providence Hospital at 733).

The Board majority observed that it was difficult to "separate" professional or technical judgment from supervisory independent judgment of Section 2(11) of the Act. Id. (citing Providence Hospital at 729). Nevertheless, according to the majority, "when a professional gives direction to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give." Id. (citing Providence Hospital at 729). The majority further stated:

> Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as . . . the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

Providence Hospital at 729. Thus, under the Board majority's view, judgment exercised in directing less-skilled employees to deliver services was not deemed "independent" if it is based on "professional or technical skill or experience," even if the judgment was significant and only loosely constrained by the employer. See Dolin at 371 (citing Providence Hospital at 729).

Member Cohen dissented, contending that the majority ignored the substantial degree of independent judgment that the charge nurses possessed. Providence Hospital at 737. He claimed that after the Supreme Court rejected the Board's "patient care" analysis, the Board majority sought "to achieve the same result through the misinterpretation of the phrase 'independent judgment'." Id. at 736. Member Cohen further stated that the majority's position is contrary to the

legislative history of the phrase "responsibly to direct" because Senator Flanders actually described the director-supervisor as one who acts on the basis of "personal experience, training, and ability." Id.

Member Cohen differentiated "independent judgment" and "professional judgment." He recognized that the supervisor exercises "independent judgment" with regard to the functions listed in Section 2(11) and he/she does so vis-à-vis employees, while the professional exercises discretion and judgment with respect to the task that he or she performs, irrespective of the Section 2(11) function and irrespective of his/her relationship with employees. See Dolin at 372 (citing Providence Hospital at 736-37).

Member Cohen illustrated this difference with the example of the task of devising a patient treatment plan that involved using professional judgment. Id. (citing Providence Hospital at 737). The nurse who devised that plan, he said, was a professional. Id. (citing Providence Hospital at 737). "But the nurse who then administered that plan may have to exercise supervisory responsibilities vis-à-vis employees. For example, the nurse may have to decide which of the various tasks (outlined in the plan) must be done first, and the nurse [may then have to] select someone to perform that task.... In addition, the nurse [may have to] take steps to assure that the task is performed correctly." Id. (citing Providence Hospital at 737). In these circumstances, the nurse is a supervisor.

Finally, Member Cohen noted that "in Section 8(a)(1) cases, the Board [had] found supervisory status with respect to individuals who [had] authority comparable to that of the charge nurses" and that the "Board should apply the same standard in unfair labor practice cases (where the General Counsel and union seek to establish supervisory status) as in representation cases (where the union often seek[s] to establish the contrary)." Id. (citing Providence Hospital at 737).

The Ninth Circuit granted enforcement of the Board's decision. In a majority opinion, the court deferred to the Board's "reasonably defensible interpretation and application of the [Act.]" Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 550 (9th Cir. 1997), enforcing 320 NLRB 717 (1996). A dissenting opinion, however, argued that by "[f]inding professional judgment 'indistinguishable' from supervisory independent judgment, the Board in effect declare[d] that a professional who is supervising other professionals cannot be a supervisor." See Dolin at 372-73 (citing Providence Alaska Med. Ctr. v. NLRB at 556). The dissent found the Board "seriously distort[ed] the statute" by "[m]aking the use of independent judgment a disqualifying factor." Id. (citing Providence Alaska Med. Ctr. v. NLRB at 556).

b. Ten Broeck Commons

Less than one month after Providence Hospital, the Board issued its decision in Ten Broeck Commons, 320 NLRB 806 (1996). Relying on Providence Hospital, the Board majority in Ten Broeck Commons found that the licensed practical nurses (LPNs) were not statutory supervisors because they did not exercise "independent judgment" in making assignments or in directing the work of employees. See Dolin at 373 (citing Ten Broeck Commons at 813).

Member Cohen again dissented, finding it "clear" that the LPNs were supervisors because they possessed authority with respect to a number of Section 2(11) functions. Id. (citing Ten Broeck Commons at 814-16). He noted that performing a directing function on the basis of "greater skill and experience" is precisely what Senator Flanders spoke of as characterizing the supervisory nature of the responsible direction function. Id. (citing Ten Broeck Commons at 815). According to Member Cohen:

> the essence of independent judgment is that the individual's actions are based on the thought processes of that individual, rather than on some outside force or person. Certainly, an individual who makes a "personal judgment based

> on personal experience, training and ability" is making an independent judgment.

Id. (citing Ten Broeck Commons at 815). In Member Cohen's view, the LPNs were not merely lead persons because monitoring and directing other employees was an important part, not a mere incidental part, of their functions. Id.

One commentator analyzed the Board's decisions in Providence Hospital and Ten Broeck Commons and concluded that the Board "ha[d] done nothing more than create a new false dichotomy dependent upon 'patient care' analysis." See G. Roger King, *Where Have All the Supervisors Gone? – The Board's Misdiagnosis of* Health Care & Retirement Corp., 13 Lab. Law. 343, 352 (1997). By distinguishing between the "expert judgment" exercised by professionals and the "independent judgment" used by supervisors, the commentator (Roger King) argued that the Board in essence had attempted to resurrect its "'patient care analysis,' which had created a false dichotomy between performing an activity 'in the interest of a patient' and performing it 'in the interest of an employer.'" Id. According to this commentator, the Board's analysis "misinterpret[ing] the phrase 'independent judgment,' from Section 2(11)[,]... ha[d] really done nothing more than create another analytical framework which is inconsistent with Section 2(11) and the policy behind it, and seem[ed] determined to continue 'pigeon-holing' nurses into the 'employee' category while excluding them from supervisory status." Id. at 353.

c. Mississippi Power

In Mississippi Power, 328 NLRB 965 (1999) the Board overruled the established precedent set by Big Rivers Electric Corp., 266 NLRB 380 (1985), and further expanded the rationale of Providence Hospital when it concluded that distribution dispatchers and system dispatchers for a utility company were not supervisors, even though they assigned and directed field employees. See Dolin at 374 (citing Mississippi Power, 328 NLRB at 974-75). In its majority

decision, the Board specifically relied on "the principle that the exercise of even critical judgment by employees based on their experience, expertise, know-how, or formal training and education does not, without more, constitute the exercise of supervisory judgment" and cited Providence Hospital in this regard. Id. (citing Mississippi Power at 970). Contrary to the suggestion made by the dissent, the majority opinion stated this case did not represent an extension of a new test to nonprofessional employees and cited the holding of Ten Broeck Commons as an example of the Board having previously applied this test to non-professionals. Id. (citing Mississippi Power at 970).

The majority also relied on certain circuit courts of appeals explicitly or implicitly upholding the Board's approach on the supervisory issue charge nurse cases. Id. (citing Mississippi Power at 970). Although recognizing that charge nurses' responsibilities differed from those of the dispatchers', the majority opinion nonetheless found the legal principles contained in the charge nurse cases were relevant. Id. (citing Mississippi Power at 970-71). As the majority opinion stated:

> Charge nurses' responsibilities obviously differ from dispatchers' responsibilities. . . . Nonetheless, the legal principles are related to the issues in this case. A professional, technical, expert, or experienced employee is often required, as part of the employee's own job, to make detailed and complex decisions. The judgment required in making those decisions does not, however, "transform" that employee into a supervisor. And the mere communication of that information to other employees does not mean that the alleged supervisor uses supervisory judgment in assigning and directing others, especially when such assignments and directions flow from professional or technical training and do not independently affect the terms and conditions of employment of anyone.
>
> The Board and the courts have applied the basic principle of the charge nurse cases discussed above to other industries.

Mississippi Power at 970. The Board majority then went on to justify its reversal of Big Rivers from a public policy standpoint. See Dolin at 375 (citing Mississippi Power at 971). Its policy argument was based on its finding that since 1983, when the Board decided Big Rivers, "industrial workplaces had undergone accelerating change due to increasing technological innovation" and that

"the work force increasingly requires 'quasi-professional' employees who must use independent judgment in their own work" and "'quasi-overseer' employees who must use independent judgment in their own work." Id. (citing Mississippi Power at 971). The Board majority concluded that the judgment exercised by the dispatchers related only to their "own responsibilities, ... based on their experience and technical expertise, and [did] not evidence any control over personnel." Id. at 375-76 (citing Mississippi Power at 973).

Members Hurtgen and Brame dissented, concluding that the majority had neither presented a compelling case for overruling Big Rivers nor for rejecting the weight of case law holding the system and distribution dispatchers to be Section 2(11) supervisors. Id. at 376 (citing Mississippi Power at 975-76, 982).

The dissent recognized that for nearly half a century, federal courts of appeals had "overwhelmingly found" (1) that individuals who monitored the transmission and distribution of power for utility companies responsibly directed employers through the use of independent judgment and therefore were supervisors; and (2) that the Board in Big Rivers "acceded to the weight and reasoning of [this] judicial precedent and determined that 'system supervisors' were statutory supervisors." Id. (citing Mississippi Power at 975).

The dissent found that the legislative history of the phrase "responsibly to direct" supported a finding that these dispatchers were supervisors. Id. (citing Mississippi Power at 976). In this regard, the dissent cited the Senator Flanders statement that a supervisor "might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability." Id. (citing Mississippi Power at 976).

The dissent criticized the majority's reliance on technical advances as warranting a reversal of Big Rivers, stating this reliance "obfuscates the relevant inquiry: whether, irrespective of available technology or guidelines, the dispatchers in directing and assigning employees are charged with taking whatever steps are necessary – including bypassing even the most automated technology." Id. (citing Mississippi Power at 980).

Further, the dissent criticized the majority for seeking to expand the rationale in Providence Hospital to non-professional employees, noting that several courts of appeals had already rejected this analysis. Id. (citing Mississippi Power at 981). Perhaps most fundamentally, the dissent stated:

> the real inquiry is not professional vs. nonprofessional, but whether these persons exercise independent judgment. That the dispatchers may call on their own skill, experience, and training in directing and assigning complex switching operations does not make those decisions any less than independent. To the contrary, this factor emphasizes the individual human judgment that is involved.

Id. at 376-77 (quoting Mississippi Power at 981).

C. The Kentucky River Case Demonstrates That A Broader Definition of "Independent Judgment" and of Supervisor Status In General Is Warranted.

Less than two years after the decision in Mississippi Power, the Board's reading of the term "independent judgment" was rejected by the Supreme Court in NLRB v. Kentucky River Community Care, 532 U.S. 706, 721 (2001). The Supreme Court there affirmed the Sixth Circuit's refusal to enforce the Board's bargaining order in a case concerning the supervisory status of charge nurses. Id.

1. Facts of Kentucky River

Kentucky River Community Care operated a mental care facility for residents. See Dolin at 377 (citing Kentucky River at 708). The facility, named Carey Creek Development

Complex, employed about 110 professional and non-professional employees in addition to about a dozen undisputed managers and supervisors. Id. (citing Kentucky River at 708). The Kentucky State District Council of Carpenters petitioned the Board to represent a single unit of 110 potentially eligible employees. Id. (citing Kentucky River at 708-09). At the representation hearing, the employer objected to the inclusion of six registered nurses in the unit, arguing they were "supervisors" under the Act. Id. at 377-78 (citing Kentucky River at 709). The Regional Director found that the employer had not carried its burden of showing supervisory status and included the six RNs in the voting unit. Id. at 378 (citing Kentucky River at 709). The Union was elected, the employer refused to bargain, and the Board issued a bargaining order. Id. (citing Kentucky River at 709). The employer petitioned for review of the Board's decision in the Sixth Circuit. Id. (citing Kentucky River at 710).

2. The Sixth's Circuit's Refusal To Enforce The Bargaining Order

The Sixth Circuit granted the employer's petition and refused to enforce the bargaining order. Id. (citing Kentucky River at 710). "It held that the Board had erred in placing the burden of proving supervisory status on [the employer] rather than on [the] General Counsel, and ... rejected the Board's interpretation of 'independent judgment.'" Id. (citing Kentucky River at 710). The court found that the Board also "erred by classifying the practice of a nurse supervising a nurse's aid in administering patient care as 'routine' [simply] because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with 'management.'" Kentucky River at 710. The Board petitioned for a writ of certiorari, which the Supreme Court granted. NLRB v. Kentucky River Community Care, 530 U.S. 1304, 1304 (2000).

3. Issues Before the Supreme Court

There were two issues before the Supreme Court:

(i) which party in an unfair labor practice proceeding bears the burden of proving or disproving an individual's supervisory status; and

(ii) whether judgment is not "independent judgment" to the extent that it is informed by professional or technical training.

See Dolin at 378 (citing Kentucky River, 532 U.S. at 711-12, 714). As to the first issue, the Court sustained the Board's rule and held that the burden is borne by the party claiming that the individual is a supervisor. Id. (citing Kentucky River at 711). It reasoned that "the Board's rule is supported by 'the general rule of statutory construction that the burden of proving ... [an] exemption under a special exception to the prohibitions of a statute generally rests on the party who claims its benefits'" and that the Act's definition of "employee" would include supervisors were they not expressly excluded. Id. at 378-79 (citing Kentucky River at 711). Furthermore, the Court justified its holding by recognizing that it is easier to prove an [individual's] authority to exercise one of the twelve listed supervisory functions than to disprove an [individual's] authority to exercise any of those functions. Id. at 379 (citing Kentucky River at 711).

The second issue formed the crux of the court's opinion. At the outset, the Court found that two aspects of the Board's interpretation were reasonable and hence controlling:

(1) "that the statutory term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status." Thus, "[it] falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies"; and

(2) "that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer."

Id. (citing Kentucky River at 713-14). The Court then went on to hold, however, that the Board's categorical exclusion of "a particular *kind* of judgment, namely 'ordinary professional or technical

judgment in directing less-skilled employees to deliver services'" was "unsupportable." Id. (citing Kentucky River at 714). The Court found that the Board's exclusion of "ordinary professional or technical judgment . . . insert[ed] a startling categorical exclusion into statutory text that does not suggest its existence." Id. (citing Kentucky River at 714). According to the Court, "[t]he text, by focusing on the 'clerical' or 'routine' (as opposed to 'independent') nature of the judgment, introduces the question of degree of judgment . . . . But the Board's categorical exclusion turns on factors that have nothing to do with the degree of discretion an employee exercises." Id. (citing Kentucky River at 714). It reasoned this categorized exclusion contradicted what in the Court's view was clearly "independent judgment," namely judgment that is significant and only loosely constrained by the employer but deemed to be "professional or technical." Id. (citing Kentucky River at 714).

The Court found the breadth of this exclusion "all the more startling by virtue of the Board's extension of it to judgment based on greater 'experience,' as well as formal training." Id. at 379-380 (citing Kentucky River at 715). According to the Court, not much supervisory judgment worth exercising is outside of "professional or technical skill or expertise," and "[i]f the Board applied this aspect to its [independent judgment] test to every exercise of a supervisory function, it would virtually eliminate 'supervisors' from the Act." Id. at 380 (citing Kentucky River at 715).

The Board, however, limited its categorized exclusion with a qualifier – "[o]nly professional judgment that is applied 'in directing less skilled employees to deliver services' is excluded from the statutory category of independent judgment.'" Id. (citing Kentucky River at 715). "Decisions 'to hire, ... suspend, lay off, recall, promote, discharge ... or discipline' other employees" also depend on the exercise of professional, technical, or experienced judgment, but were left out of the Board's standard, the Court said. Id. (citing Kentucky River at 716). While application of this qualifier of independent judgment for the "responsibly to direct" indicia avoided

the virtual elimination of "supervisors from the Act," it was, in the Court's view, contrary to the text of the Act, which requires the use of "independent judgment" for every supervisory function listed by the Act. Id. (citing Kentucky River at 716).

The Court therefore found that the Board's application of its restriction to just one of the twelve listed functions ("responsibly to direct") was without justification and "particularly troubling" in light of Health Care because the Board's interpretation of "independent judgment" has precisely the same object as its prior interpretation of "in the interest of the employer" that it had succeeded. Id. (citing Kentucky River at 716).

The Court rejected the Board's argument that the legislative history incorporated the categorical restriction on "independent judgment," as well as the Board's policy argument that its interpretation was necessary to preserve "professional employees" within the coverage of the Act. Id. (citing Kentucky River at 717, 719-20). According to the Court, this Board interpretation contradicted "the text and structure of the [Act], ... as well [as] the rule of Health Care that the test for supervisory status applies no differently to professionals than to other employees." Kentucky River at 721.

The Supreme Court's decision in Kentucky River was true to the plain language of Section 2(11) of the Act and the legislative history of the term "supervisor." The text of Section 2(11) of the Act, by focusing on the "clerical" or "routine," (as opposed to the "independent") nature of the judgment, introduces the question of degree of judgment, but the Board's categorical exclusion turns on factors that have nothing to do with the degree of discretion exercised. See Dolin at 381. Thus, the Board's categorical exclusion would exclude judgment that is significant and only loosely constrained by the employer, based solely on the source of the judgment (e.g., based on personal experience, expertise, know-how, formal training, and education). Id. The legislative

history of the phrase "responsibly to direct" shows that this supervisory indicia is satisfied when it is exercised with "personal judgment based on personal experience, training, and ability." Id. There is support in neither the language of Section 2(11) nor the legislative history of this section for any categorical exclusion of a particular kind of "independent judgment" in the context of the "responsibly to direct" supervisory function. Id. Finally, Member Cohen's differentiation of "independent judgment" and "professional judgment" in Providence Hospital easily avoids any alleged tension between the two terms. Id. It is irrational to presume that when an individual uses "professional or technical judgment" in the responsible direction of employees, he is not using "independent judgment." Id.

D. The Meaning of the Term "Independent Judgment" as Used in Section 2(11) of the Act, The Degree and Scope of Discretion Required for Supervisor Status, and The Definition, Test, and Factors Which the Board Should Consider In Applying The Term "Independent Judgment"

The holding in Kentucky River left open the question as to the "degree" of discretion required for supervisory status, while making it clear that the Board could not categorically eliminate certain types of judgment from making putative supervisors statutory supervisors. Despite this open question, it is clear that a putative supervisor should be considered a statutory supervisor when he or she exercises any degree of "independent" judgment. So-called "ordinary" professional or technical judgment used in directing less-skilled employees to deliver services should now certainly be considered statutory "independent judgment" where the judgment is significant and only loosely constrained by the employer. See, e.g., Beverly Enters.-Minnesota, Inc. v. NLRB, 266 F.3d 785, 788-90, (8th Cir. 2001), where the court denied enforcement of the Board's determination that nurses were not supervisors because they did not exercise independent judgment when directing or assigning other employees. The Board's determination was based on its understanding that "[a] nurse's articulating the meaning of an established health care routine . . .

[w]ithout more . . . is not exercising § 2(11) independent judgment, but only making routine professional or technical judgment." Id. at 787-88 (citation omitted).

The term "independent" in the statutory supervisor context means that the putative supervisor acts on his own, without management determining his course of action. See, e.g., Chevron Shipping Co., 317 NLRB 379, 381 (1995) (individual not a supervisor because he was obligated to follow standing orders and Operating Regulations, and had to contact a superior officer to deviate from those orders and Regulations). However, the putative supervisor should be found to act "independently" even where his course of action is limited by company policies or procedures. See, e.g. Dynamic Mach. Co. v. NLRB, 552 F.2d 1195, 1201 (7th Cir. 1977) (noting that the Board found a worker a supervisor despite the fact that his assignment "options were limited and only a few factors needed to be taken into account in assigning work"); NLRB v. Adam & Eve Cosmetics, Inc., 567 F.2d 723, 728-729 (7th Cir. 1977) (overturning the Board's determination that a worker was not a supervisor, reasoning: "That the choices [the worker] had in assigning and directing work were severely circumscribed by the menial nature of the tasks performed and the limited skills of his coworkers ... does not mean that [he] was not called upon to use his own judgment in the course of the job"); American Diversified Foods, 640 F.2d 893, 896 (7th Cir. 1981) (overturning ALJ determination that worker was not a supervisor, despite fact that assignment operated within "common sense limitations").

Nor should the mere existence of written policies and procedures result in a finding that a putative supervisor's actions are "routine or clerical." In NLRB v. Quinnipiac Coll., 256 F.3d 68, 74-75 (2d Cir. 2001), the Second Circuit stated that "the existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive." A putative

supervisor may exercise independent judgment, even when there are policies and procedures providing guidance to the decision.

Senator Flanders indicated that independent judgment meant "personal judgment based on personal experience, training and ability." See Legislative History at 1303. Making subjective judgments with respect to myriad factors demonstrates the existence of independent judgment. Century Electric Co., 146 NLRB 232, 239 (1964) (individual engaged in independent judgment when having to make production scheduling decisions based upon speed, tolerance, set up time and costs). In addition, when a putative supervisor makes assignments based upon the skills of the employees, that putative supervisor is exercising in independent judgment. Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001) (pilots considered skills and abilities of crew members when assigning tasks to the crew); Alois Box Co., Inc. v. NLRB, 216 F.3d 69, 73-75 (D.C. Cir. 2000).

While an individual is not a statutory supervisor if he or she exercises independent judgment only on an irregular or sporadic basis when not expressly given authority by an employer, Browne v. Houston, 280 NLRB 1222, 1225 (1986), if the authority is present, the actual exercise of that authority is irrelevant. NLRB v. Southern Seating Co., 468 F.2d 1345 (4th Cir. 1974); Multimedia KSDK v. NLRB, 303 F.3d 896, 899 (8th Cir. 2002).

Thus, in determining whether a putative supervisor has engaged in "independent judgment," the Board should determine whether (1) the putative supervisor is taking an action based upon personal knowledge, training or experience; (2) the putative supervisor's decision to take such action is based upon at least some subjective criteria (regardless of any policies or procedures which may limit the options available); and (3) the putative supervisor engages in any one of the twelve listed supervisory functions (either to act or effectively to recommend such action) without approval

from his superiors. If those three factors are in the affirmative, then the putative supervisor has engaged in "independent judgment," and should be found a statutory supervisor.

E. The Difference and Similarity of the Terms "Assign" and "Direct"

The Board should consider the terms "assign" and "direct" to be related criteria. In Providence Hospital, 302 NLRB 717, 727 (1997), enforced sub nom., 121 F.3d 548 (9th Cir. 1997), the Board acknowledged that "[c]ertainly there are times when the assignment of tasks overlaps with direction. For example, ordering a nurse to take a patient's blood pressure could be viewed as either assigning the nurse to that procedure or directing the nurse in the performance of patient care. Because the distinction between assignment and direction in these circumstances is unclear, the Board has often analyzed the two statutory indicia together."

The Legislative History is clear in that the statutory term "responsibly to direct" was added to the enumeration of supervisory powers in order to replace the Board's prior conjunctive test (responsibly to direct and another supervisory function) with a disjunctive test (responsibly to direct or any other supervisory function). While this resulted in some overlap between the terms "assign" and "direct," the two are not synonymous.

Congress added the phrase "responsibly to direct" to the enumeration of supervisory powers because, in the words of Senator Flanders:

> [U]nder some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a larger responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instruction for its proper performance. If needed, he gives training to the performance of unfamiliar tasks to the workers to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees . . . ." Their essential managerial duties are best defined by the words, "direct responsibly" . . . .

See Legislative History at 1303.

Senator Flanders' definition of "direct" is not synonymous with the term "assign." His definition of direct includes "determin[ing] under general orders what job shall be undertaken next and who shall do it . . . giv[ing] instruction for its proper performance . . . [and] giv[ing] training to the performance of unfamiliar tasks to the workers to whom they are assigned." See Legislative History at 1303. As such, Senator Flanders indicates that determining who would perform specific tasks is included in the statutory term "assign" (demonstrated by his use of the term "assign" when defining "direct") and that such activity would be included in both statutory terms. However, to "direct" goes beyond simply to "assign," as to "direct" would include giving instructions and training to employees.

In Bernhardt Bros. Tugboat Service, 142 NLRB 851 (1963), enforced 328 F.2d 757 (7th Cir. 1964), the pilots were found to have "directed" crew members because they determined which crew member should be assigned as a lookout, and were able to give daily orders to the crew in connection with the tow, the lock, and the amount of power needed for the vessel. Id. at 854. Similarly, in Ingram Barge Co., 136 NLRB 1175, 1203 (1962), enforced, 321 F.2d 376 (D.C. Cir. 1963), the Board affirmed the ALJ's decision that the riverboat masters, pilots and mates in question "directed" employees because they gave orders to the crew members during their shifts.

While the terms overlap, they are not identical. For example, if the putative supervisor tells an employee to perform a task but gives no instruction or training regarding the task, the putative supervisor would have "assigned" the task to the employee, and may also have "directed" the employee to perform the task. Since the putative supervisor was selecting tasks for the employee, he or she should be considered to have satisfied the "assign" criteria, and will also be found to satisfy the "responsibly to direct" criteria if the employer holds that putative supervisor

responsible for ensuring that the task was performed, but will not satisfy the criteria of "responsibly to direct" if the employer does not hold the putative supervisor responsible for ensuring that the task is performed.

Conversely, if an employer (but not the putative supervisor) assigns a task to an employee but holds the putative supervisor responsible for ensuring that the task is performed properly by that employee, and that putative supervisor provides training or information to the employee who is performing the task, then that putative supervisor satisfies the "responsibly to direct" criteria, even though he does not satisfy the "assign" criteria.

F. Meaning of the Word "Responsibly" in the Statutory Phrase "Responsibly To Direct"

The Board should consider the term "responsibly" in the phrase "responsibly to direct" to mean that the putative supervisor is held responsible or accountable by the employer for directing employees. Senator Flanders' description of a supervisor gives a list of activities that demonstrate what it means for an individual to direct employees. The question then posed is what it means to "responsibly" direct those employees. While Senator Flanders does not delve into the "responsibly" aspect of this issue, there are cases which hold that when a person is held accountable for the actions of those he or she directs, that person "responsibly" directs those employees. For example, in Mardril, Inc., 119 NLRB 1174, 1181-82 (1957), it was found that river pilots had authority for the safety of the crew, to determine whether it was safe to operate, and to order drills. These actions evinced "responsible" direction.

In Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 490 (2d Cir. 1997), the Second Circuit stated that "[t]o be responsible is to be answerable for the discharge of a duty or obligation." The pilots in that case were required to enforce rules or risk losing their license. Id. at 490-92. These pilots were found to "responsibly" direct the crews, since they were held personally

accountable for any accidents. Id. Furthermore, it was irrelevant whether the responsibility came solely from the employer or from outside sources (i.e., Coast Guard regulations). Id. at 491. What was important was that the pilots were "responsible" for others' actions, and faced the consequences of the crew's failure to perform those actions.

Similarly, in Bernhardt Bros. Tugboat Service, 142 NLRB 851 (1963), the pilots were found to have "responsibly directed" crew members. While the Board found that, at times, the pilots acted as conduits from upper levels of management to the crew, it also found that the pilots' responsibility extended far beyond merely acting as a conduit. For example, the Board found that the pilots, "relying upon [their] own experience and judgment, decide[d] if the weather [was] bad enough to require a lookout against shifting navigational hazards, and if so when and where to place the lookout and which crew member should be so assigned." Id. at 854. Furthermore, the Board found that the pilots gave orders to crew in connection with the tow, the lock, and the amount of power needed for the vessel. Id. In addition, the Board found that the "pilot on watch is responsible for the tow." Id. Based upon all of these factors, the Board found that the pilots had "authority responsibly to direct the crew members on their watch.." Id. As such, the pilots were found to be statutory supervisors. Id.

Finally, in Ingram Barge Co., 136 NLRB 1175, 1203 (1962), enforced, 321 F.2d 376 (D.C. Cir. 1963), the Board affirmed the ALJ's decision that the riverboat masters, pilots and mates in question had authority "responsibly to direct employees," and were therefore statutory supervisors. In reaching this decision, the ALJ relied upon a number of factors: (1) the masters, pilots and mates were regarded as "officers" by the employers for whom they worked and all other deck personnel on the boat; (2) the term "officer" had a precise meaning to personnel aboard the boats, which was "a person with authority to issue orders in the performance of work which

nonofficer deck personnel must obey"; (3) the responsibility of a pilot when he relieved the master was the same as the master's with respect to the safety of the boat, tow, and the entire crew; (4) the pilot with authority issued orders to mates and deckhands with they were required to unhesitatingly and faithfully execute, and the failure to do so could have resulted in serious damage to property and injury to persons; and (5) the mates, particularly with regard to locking and docking operations and in emergency situations, had authority to order performance of duty by subordinate deckhands who were required to obey those orders or risk discharge. Id. at 1203.

That others may share responsibility is irrelevant. In Bernhardt Bros. Tugboat Servs., 142 NLRB 851, 854 (1963) and Ingram Barge Co., 336 NLRB No. 131 (2001), pilots were found to be statutory supervisors notwithstanding the fact that the boat's master (or captain) retained overall responsibility for the boat. In Ingram Barge Co., the Board affirmed the ALJ's finding that the pilots had the authority "responsibly to direct" because the pilot, for his two watch periods each day, was "fully responsible for the operation of the boat and its load of barges," and this responsibility included directing the work of the deck crew. Id. at slip. op. 5. "The captain remains ultimately responsible for the safety and welfare of the towboat but that does not diminish the responsibility of the pilot." Id. Thus, even if that responsibility is shared, the possession of any responsibility for others' actions, combined with the direction of those tasks, makes a person a statutory supervisor.

G. The Distinction Between Directing "the Manner of Others' Performance of Discrete Tasks" and Directing "Other Employees"

The Supreme Court in Kentucky River declined to interpret the statutory phrase "responsibly to direct" but in dicta suggested that the Board "distinguish[] [individuals] who direct the manner of others' performance of discrete tasks from [individuals] who direct other employees." 532 U.S. at 714. Although it is questionable whether any such distinction should exist, when a

distinction has been made such distinction is predominantly based upon the use of independent judgment by the putative supervisor.

Generally, showing other employees the correct way to perform a task does not confer supervisory status. Beverly Health & Rehabilitation Services, 335 NLRB No. 54 (2001). In the Beverly Health case, LPNs communicated particular resident care requirements to the CNAs responsible for performing the work, asked periodically how things were going, asked for specific information, and reviewed the CNAs' paperwork. LPNs answered CNAs' questions and if LPNs observed the CNAs doing something wrong, showed them the correct way. The Board concluded that the LPNs were not supervisors within the meaning of Section 2(11) of the Act.

The Board in Beverly Health indicated that showing the employee how to perform a task – "directing the manner of others' performance of discrete tasks" – was not an exercise of independent judgment. This may be a correct decision if the putative supervisor is only reciting to the employee standard procedures where no subjective criteria are present. However, Senator Flanders indicated that giving "instruction for [a job's] proper performance" and giving "training to the performance of unfamiliar tasks to the workers to whom [jobs] are assigned" is "directing" an employee under the Act. See Legislative History at 1303. Thus, any distinction between directing the manner of others' performance of discrete tasks versus directing other employees is an irrelevant distinction. According to Senator Flanders' comments, a putative supervisor is "directing" other employees whether he is assigning tasks to an employee or demonstrating how to perform those tasks. In that circumstance, whether the putative supervisor should be found a statutory supervisor depends on whether he exercises independent judgment. Thus, the relevant issue is whether independent judgment is exercised when engaging in one of the twelve enumerated

supervisory functions, not whether the putative supervisor is directing the manner of the task performed or the employee.

H. The Lack of Tension Between the Act's Coverage of Professional Employees and its Exclusion of Supervisors and The Distinction Between Independent Judgment and A Professional's "Discretion and Judgment"

There is no tension between the Act's coverage of professional employees and its exclusion of supervisors. The Board in Providence Hospital, 320 NLRB 717 (1997), created a false dichotomy in this issue, because there is no mutual exclusivity between professionals and supervisors. In Providence Hospital, the Board examined the so-called tension between professional and independent judgment, finding that it was difficult to separate professional or technical judgment from independent judgment, but found that when "a professional gives direction to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give." Id. at 729.

In his dissent, Member Cohen differentiated "independent judgment" and "professional judgment," stating that the difference between the two is "substantial and real." Id. at 737. He recognized that the supervisor exercises "independent judgment" with regard to the functions listed in Section 2(11) and he/she does so vis-à-vis employees, while the professional exercises discretion and judgment with respect to the task that he or she performs, irrespective of the Section 2(11) function and irrespective of his/her relationship with employees. Id. at 736-37.

Member Cohen illustrated this difference with the example of the task of devising a patient treatment plan that involved using professional judgment. Id. at 737. The nurse who devised that plan, he said, was a professional. Id. "But the nurse who then administered that plan may have to exercise supervisory responsibilities vis-à-vis employees. For example, the nurse may have to decide which of the various tasks (outlined in the plan) must be done first, and the nurse [may then

have to] select someone to perform that task.... In addition, the nurse [may have to] take steps to assure that the task is performed correctly." Id. In these circumstances, the nurse is a supervisor.

Member Cohen's dissent is persuasive in this regard. The majority's distinction between the two types of judgment is inconsistent with the holding of Kentucky River, because it distinguishes between categories of judgment, while Member Cohen's is entirely consistent with the Supreme Court's reasoning in that case.

Furthermore, any distinction made between professional and independent judgment is contrary to Senator Flanders' position. Id. at 736. Senator Flanders described the director-supervisor as one who acts on the basis of "personal experience, training and ability." See Legislative History at 1303. Thus, a putative supervisor who acts on the basis of "personal experience, training and ability" to direct other employees, regardless of whether that person is a professional, is a supervisor under the Act. In comparison, a person who is not a professional who acts on the basis of "personal experience, training and ability" to direct other employees is also a supervisor under the Act. Finally, a professional who uses his "discretion and judgment" in the performance of his actions, but does not do so with regard to other employees, would not be a supervisor under the Act. The issue of whether one is a professional clouds and confuses the issue of whether one is a supervisor, since the two are not mutually exclusive. The relevant question is whether one engages in the enumerated statutory indicia of supervisory status.

Because there is no reason why a professional cannot be a supervisor, provided he or she meets the necessary criteria, there is also no reason why a group of professional workers cannot be deemed supervisors. The question is whether those putative supervisors engage in activity which would made them a supervisor, regardless of their status as professional employees. As the Supreme Court in Kentucky River made clear, it is the exercise of independent judgment, not the

source of that judgment, which is important. Thus, if independent judgment is used by this group of professionals vis-à-vis other employees, the entire group should be considered supervisors.

I. The Appropriate Guidelines for Determining the Status of Part-Time Supervisors

One of the issues raised in Oakwood Healthcare was the rotation of charge nurses, which caused individuals to work in putative supervisory roles only part of their working time. This issue involves putative supervisors who move from a clearly non-supervisory role to an alleged supervisory role, and does not involve the exercise of supervisory authority by someone who remains in the same position consistently. In the latter case, it is clear that if an individual possesses authority, in the name of the employer, to engage in one or more of the statutory indicia of supervisory status, then that person remains a supervisor regardless of the amount of time he exercises that authority.

In Ingram Barge Co., 136 NLRB 1175 (1962), the pilots and mates on the boat were found to be supervisors in part because "the power and authority of pilots and mates to command and obtain obedience to their orders was constant and could be applied at any time." Id. at 1203. The ALJ in Ingram Barge rejected the General Counsel's argument that the pilots and mates only sporadically exercised their authority, stating that "[t]he Board's view and that of the courts does not require a supervisor always to exercise his authority in order to retain his supervisory status," and that the important factor was the pilots' and mates' "constant power to command inherent in [their] status as [pilots and mates]." Id. at 1204.

Therefore, when a putative supervisor possesses authority in his position to engage in one of the enumerated statutory criteria in the name of the employer that requires the exercise of independent judgment, that person is a statutory supervisor, regardless of the frequency of his use of that authority.

Even when a putative supervisor only exercises his supervisory authority on rare occasions, such as emergencies, that person has been found to be a statutory supervisor. See, e.g., Monongahela Power Co. v. NLRB, 657 F.2d 608, 614 (4th Cir. 1981); Mon River Towing, 173 NLRB 1452, 1454 (1969), enforced 421 F.2d 1 (3d Cir. 1969) (pilots found supervisors because they were responsible for the safety of the crews and dealt with emergency safety matters without instruction from higher-level management).

However, when a putative supervisor does not spend all of his time in one position where supervisory authority is possessed, but spends at least a portion of his time in another position where such authority clearly is not present, the Board should use the test of whether the putative supervisor spends a "regular and substantial" part of his time in the position where supervisory authority is present to determine whether the putative supervisor is a statutory supervisor.

Individuals who spend a substantial part of each workday or workweek as supervisors are customarily excluded as such from the bargaining unit. Benchmark Mechanical Contractors, Inc., 327 NLRB 829 (1999). This is because management must have "[undivided loyalty] from its 'faithful agents' and to free supervisors from 'the leveling processes of seniority, uniformity, and standardization' that characterized unions." See Note, 94 Harv. L. Rev. at 1713. Thus, a putative supervisor who spends a substantial amount of time in a position where supervisory authority is present is – and should continue to be – considered a supervisor under the Act.

The question then becomes whether a putative supervisor spends a "regular and substantial" portion of his time in a position where supervisory authority is present. In NLRB v. St. Mary's Home, 690 F.2d 1062 (4th Cir. 1982), the court found that a registered nurse was a supervisor when, on two of five days worked each week, that individual held a position were she

was the highest ranking official present and in charge of the third shift. Thus, the amount of time spent by the individual was found to be "regular" and "not sporadic." Id. at 1067-68.

The amount of time spent as a supervisor by the individuals in St. Mary's Home is essentially identical to the amount of time spent by the putative supervisors as charge nurses in Oakwood Healthcare. In at least some instances, rotating charge nurses would spend at least forty percent of their working time as a charge nurse. This goes far beyond "sporadic" or "isolated" instances and the putative supervisors at issue in Oakwood Healthcare should thus be found statutory supervisors.

J. The Fact That Individuals May Rotate Into and Out Of Supervisory Positions Should Not Change The Board's Analysis Regarding Part-Time Supervisors

Generally, the vital question is whether the putative supervisor spends a "regular and substantial" time in a position where supervisory authority is held. It is clear that this need not be a majority of the time, and is dependent upon the facts of every situation. However, if the putative supervisor spends a "regular and substantial" time in such a position, that putative supervisor is a statutory supervisor. Furthermore, if a group of individuals rotate into a supervisory position on a recurring basis, the issue remains the same, and the Board should look at each rotating individual to see if he or she has spent a "regular and substantial" amount of time in that supervisory position.

K. Recent Developments in Management Should Only Be Considered to The Extent They Impact The Three-Part Test For Determining Supervisory Status

Another issue raised by the Board regarding the Oakwood Healthcare, Golden Crest Healthcare, and Croft Metals, Inc. is whether the Board should take into account recent developments in management when determining supervisory status. The Board should only take into account recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams to exclude individuals from supervisory status,

when those developments affect the fundamental questions of supervisory status. Those questions are:

(1) Whether the putative supervisor holds the authority to engage in any one of the twelve listed supervisory functions (either to act or effectively to recommend such action);

(2) Whether the putative supervisor's exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and

(3) Whether the putative supervisor holds that authority in the interest of the employer.

If the management development does not change the answer to any of those questions, the development should have no impact on the determination of supervisory status. This issue was raised in Mississippi Power, 328 NLRB 965 (1999), where the dissent criticized the majority's reliance on technical advances as warranting a reversal of Big Rivers, stating this reliance "obfuscates the relevant inquiry: whether, irrespective of available technology or guidelines, the dispatchers in directing and assigning employees are charged with taking whatever steps are necessary – including bypassing even the most automated technology." Id. at 980.

Thus, relying on changes in management styles vis-à-vis rank-and-file employees is an attempt to cloud the issue as to whether an individual is a supervisor, because it places the focus on the rank-and-file employees, rather than the putative supervisor.

If an employer gives its putative supervisors, in the name of the employer, authority to make decisions vis-à-vis other employees – such as assigning them tasks, disciplining them, etc. – and the putative supervisors exercise independent judgment in making those decisions, then those putative supervisors would be statutory supervisors. If the authority is present, the actual exercise of that authority is irrelevant. NLRB v. Southern Seating Co., 468 F.2d 1345 (4th Cir. 1974); Multimedia KSDK v. NLRB, 303 F.3d 896, 899 (8th Cir. 2002). Even when a putative supervisor

only exercises his supervisory authority in rare occasions, such as emergencies, that putative supervisor has been – and should continue to be – found to be a supervisor. See, e.g., Monongahela Power Co. v. NLRB, 657 F.2d 608, 614 (4th Cir. 1981); Mon River Towing, 173 NLRB 1452, 1454 (1969) (pilots found supervisors because they were responsible for the safety of the crews and dealt with emergency safety matters without instruction from higher-level management).

Thus, if an employer gives its rank-and-file employees more autonomy, this autonomy without more does not result in a putative supervisor losing his supervisory status. In this circumstance, the increased autonomy of rank-and-file employees has no effect on the putative supervisor's authority to engage in any one of the twelve listed supervisory functions (either to act or effectively to recommend such action), his exercise of independent judgment in engaging in one or more of those functions, or whether the putative supervisor holds that authority in the name of the employer. In all such cases, "management developments" would be irrelevant. Only if the greater autonomy to the employees eliminates the putative supervisor's authority to engage in one the twelve supervisory functions, eliminates his use of independent judgment, or eliminates his authority to act in the interest of the employer should such a grant of greater autonomy impact the supervisory status of the putative supervisor.

Although the Board may perceive any managerial developments as relevant, it should not let that perception cloud its view of the facts of each particular situation. In Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 211 (5th Cir. 2001), the court rejected the Board's justification for changing its prior-held position based upon the modern work force and workplace changes that makes quasi-professionals and quasi-overseers more common because "[i]t is the specific facts, not the Board's perception of labor trends, that must determine how the relevant law applies." Thus, when the issue of "recent developments in management" is raised, the Board

should focus on the putative supervisor, not the rank-and-file employees, and determine whether that putative supervisor (1) has the authority to engage in one or more of the twelve enumerated statutory indicia; (2) exercises independent judgment in his use of that authority; and (3) holds that authority in the name of the employer.

L. The Distinction Between "Straw Bosses, Leadmen, Set-Up Men and Other Minor Supervisory Employees" and "The Supervisory Vested with 'Genuine Management Prerogatives'"

There are two areas that distinguish genuine supervisors from "straw bosses, leadmen, set-up men and minor supervisory employees." Those areas are the independent judgment used by genuine supervisors and the responsibility and authority given to genuine supervisors by the employer. As Senator Flanders stated regarding this issue:

> [U]nder some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a larger responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instruction for its proper performance. If needed, he gives training to the performance of unfamiliar tasks to the workers to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees . . . ." Their essential managerial duties are best defined by the words, "direct responsibly" . . . .

See Legislative History at 1303.

The most important factor in distinguishing a genuine supervisor from a "straw boss" is the exercise of independent judgment. If a putative supervisor exercises independent judgment in engaging in any one of the twelve listed supervisory functions (either to act or effectively to recommend such action) and the possesses that authority in the name of the employer, the putative supervisor is a statutory supervisor. In finding that pilots exercised independent judgment in Ingram Barge Co., 336 NLRB No. 131 (2001), the ALJ concluded:

> The pilot is the sole wheelhouse officer on watch during 12 hours each day. Obviously, the operation of a vessel up to a quarter mile long . . . involves dynamic activity. Weather, river traffic, changing currents, floating debris, and whether the towboat itself is operating properly are among factors that necessitate changes in the navigation or in the way the tugboat is operated. While on watch the pilot must make decisions regarding those operational changes. Those decisions may, in turn, necessitate the directing of work by the deck crew . . . [T]he pilots' direction of the work of the deck crew is not routine.

Id. at slip. op. 5. The use of the pilots' experience and knowledge, without having to obtain permission from other individuals, resulted in a finding that these decisions were based upon "independent judgment," making the pilots supervisors.

In Bernhardt Bros. Tugboat Service, 142 NLRB 851 (1963), the Board found that the pilots exercised independent judgment when those pilots, "relying upon [their] own experience and judgment, decide[d] if the weather [was] bad enough to require a lookout against shifting navigational hazards, and if so when and where to place the lookout and which crew member should be so assigned." Id. at 854.

Similarly, in Ingram Barge Co., 136 NLRB 1175, 1203 (1962), the Board affirmed the ALJ's decision that the riverboat masters, pilots and mates were statutory supervisors and exercised independent judgment when they carried out their responsibility while "frequently confronted with complex procedures which involved skillful independent judgment, complicated by variable changing factors, many of them unforeseeable, which did not permit his duties to be characterized as routine."

The ALJ rejected the General Counsel's contention that the actions of pilots and mates was of a "routine" or "mechanical" nature, similar to that of a streetcar or bus driver, stating that:

> The most cursory appraisal of the swift on-the-spot judgments of pilots and mates and the orders given pursuant thereto while maneuvering 1,000-foot

> tows in the face of unpredictable winds, currents, and weather conditions reduces to sheer implausibility any characterization of such judgments and orders as routine. The direct concern of pilots and mates with the conduct of subordinates to effect a safe and efficient locking or docking or to prevent a catastrophe in an emergency in which the boat, tow, and crew aboard are at the peril of the river and the elements may hardly be compared to the control over the streetcars and buses of the Capital Transit Company by its inspectors.

Id. at 1203.

Such may also be the case with regard to the charge nurses in Oakwood Healthcare and Golden Crest Healthcare and the leadpersons in Croft Metals, Inc. If those putative supervisors are required to make judgments regarding other employees, based upon their experience, training or knowledge, without having to obtain permission from their superiors, then those putative supervisors have exercised independent judgment.

For example, in Oakwood, the charge nurses were authorized to assign tasks to other employees. If those nurses are given autonomy in making those assignments, and those assignments are not based upon other factors outside of the nurses' control (i.e., seniority), then those nurses have engaged in independent judgment in making those assignments and are statutory supervisors.

The Regional Director in Oakwood found that that the charge nurses' assignment of discrete tasks was based upon doctor's orders, hospital policy and procedures, standing orders, or what was dictated by their profession and therefore did not require the use of independent judgment. We submit that may have been in error. It may be true that if the charge nurses were following the specific orders outlined in other documents, including who to assign and when, then independent judgment may not have been involved. However, if the charge nurses had the discretion to decide whom to assign the task, based upon the charge nurse's independent assessment of need, ability or other factors, then the charge nurses used independent judgment in making those determinations,

irrespective of whether other documents related to these issues existed. Furthermore, with regard to the Regional Director's statement that decisions "dictated by [the charge nurses'] profession" were outside the purview of independent judgment, that finding is clearly contrary to the Supreme Court's decision in Kentucky River.

Thus, if a putative supervisor exercises independent judgment to engage in any one of the twelve listed supervisory functions (either to act or effectively to recommend such action), he or she is more than a "straw boss, leadman, set-up man, or other minor supervisory employee."

Another distinction between genuine supervisors and "straw bosses, leadmen, set-up men and other minor supervisory employees" relates to the authority "responsibly to direct" other employees. If a putative supervisor is held accountable not only for his actions, but also for the actions of the employees whom he directs, then that putative supervisor would be found to "responsibly direct" his employees. Responsible direction distinguishes, in many, if not most, cases, the genuine supervisor from a "straw boss, lead man, set-up man, or other minor supervisory employee," who lack such responsibility. See, e.g., Mardril, Inc., 119 NLRB 1174 (1957) (riverboat pilots found to be supervisors because they were responsible for the safety of the crew and tow, and had the authority to order drills); Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2d Cir. 1997) (pilots were supervisors because they were found to have responsibly directed the crew); Ingram Barge Co., 336 NLRB No. 131 (2001) (pilots were supervisors because they responsibly directed the crew).

M. The Board Should Continue To Consider Secondary Indicia In Determining Supervisory Status

Although secondary indicia of supervisory status is not addressed in the Act, the Board should continue to consider secondary indicia in determining supervisory status, to the extent that it sheds light upon whether the putative supervisor in question (1) possesses the authority to

engage in one of the twelve listed supervisory indicia in the Act; (2) exercises independent judgment in using this authority; and (3) holds such authority in the name of the employer.

There is a longstanding practice of the Board considering "secondary indicia" in determining whether a particular individual is a "supervisor" within the meaning of the Act. Some of these "secondary indicia" include (1) whether the putative supervisor is considered a supervisor by fellow workers; (2) whether the putative supervisor considers himself to be a supervisor; (3) whether the putative supervisor attends management meetings; (4) whether the putative supervisor receives a higher wage rate than fellow employees; (5) whether the putative supervisor has substantially different benefits from fellow employees; and (6) the ratio of supervisors to non-supervisors. See A.O. Smith Automotive Prods. Co., 315 NLRB 994 (1994); Typographical Union No. 101 (Columbia), 220 NLRB 1173 (1975); Liquid Transporters, 250 NLRB 1421 (1980); American Indus. Cleaning Co., 291 NLRB 399 (1977); and Pennsylvania Truck Lines, 1999 NLRB 641.

We submit these indicia are relevant but only to the extent that they show that (1) the putative supervisor possesses the authority to engage in one of the twelve listed supervisory indicia in the Act; (2) the putative supervisor exercises independent judgment in using this authority; and (3) the putative supervisor holds such authority in the name of the employer.

Put another way, these secondary criteria are important when they demonstrate the presence of one or more of the criteria necessary for supervisory status to be found. The belief, by fellow workers or the putative supervisor himself, that the putative supervisor is a supervisor is relevant when it supports the contention that the putative supervisor has the authority to assign or responsibly to direct employees. The attendance by the putative supervisor at management meetings is relevant when it demonstrates the evidence of his authority to act in the interest of the

employer. Higher wages or substantially different benefits in comparison to rank-and-file employees can support the necessary authority or increased responsibility held by the putative supervisor.

One of the significant secondary indicia that relates to "responsibly to direct" which the Board and courts have looked at over the years is the presence of higher authority on the shift where the putative supervisor works. If the putative supervisor is the highest-ranking employee present on the shift, and there are no other supervisors present, then this factor supports a finding that the putative supervisor is a statutory supervisor, particularly when there is evidence that the employer has given authority and responsibility for the employees' performance on that shift to him. For example, in cases involving riverboat pilots, pilots have been found to be supervisors because otherwise the crew would be entirely without supervision for the twelve hour shifts where the pilot was present but the ship's captain (or master) was not. See, e.g., Mon River Towing, 173 NLRB 1452, 1455 (1969) (citing Rafael Vega v. NLRB, 341 F.2d 576 (1st Cir. 1965)); Mardril, Inc., 119 NLRB 1174, 1181 (1957); Globe Steamship Co., 85 NLRB 475, 479 (1949) ("without [the pilots'] command power, there would be no controlling head during these watches"). see also Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719 (7th Cir. 2000) (denying enforcement of Board order finding disputed individuals not be supervisors because such holding would have resulted in "a ship with more than 1,000 people aboard it . . . [that] has no supervisor on board at any time").

Where unrelated to the statutory criteria, then secondary indicia are irrelevant. For example, the ratio of supervisors to non-supervisors will be irrelevant where the evidence is otherwise clear that the putative supervisor responsibly directs employees or possesses one of the other statutory indicia of supervisory status. In Ingram Barge Co., 136 NLRB 1175 (1962), the General Counsel argued that pilots and mates should not be found supervisors because, in doing so,

the ratio of supervisors to non-supervisors would be only one supervisor to one employee. Id. at 1204. However, the ALJ found this argument unpersuasive, stating that:

> This is a circumstance which I have considered but do not in this case consider controlling. It is never by itself controlling but only a factor to be considered with all others in deciding whether an alleged supervisor really has the authority ascribed to him. The record shows that pilots and mates in the performance of their duties do in fact have supervisory authority over deck employees, however few in number such employees may be. The high ratio of supervisors to deck employees on the boats does not detract from the existence of that authority.

Id. Thus, simply because there is a high ratio of supervisors to deck employees does not mean that the putative supervisors lack supervisory status. The focus should remain upon the actions and authority of the putative supervisors, not on the number of employees they supervise.

In Oakwood Healthcare, there were a number of "secondary indicia" of supervisory status for charge nurses. For example, Charge nurses earned $1.50 per hour more than non-charge nurses. This increased pay supports a finding that charge nurses had increased responsibility and authority in the name of the employer. Finally, in many cases, these charge nurses were the highest-ranking individuals present during their shifts. This, too, supports a finding that the nurses held responsibility and authority in the name of the employer. Therefore, these secondary indicia would support a finding of supervisory status because they tend to show that the charge nurses (1) possess authority to engage in one or more of the twelve listed statutory indicia; (2) exercise independent judgment when using this authority; and (3) hold that authority in the name of the employer.

Thus, the focus of the determination of supervisory status should remain on the criteria outlined in Section 2(11) of the Act, and analyzing secondary criteria should not supplant the enumerated criteria of the Act. Nevertheless, secondary indicia should remain an important

resource for the Board to review in borderline cases, particularly when the secondary indicia supports the existence of statutory criteria.

N. The Kentucky River Decision Mandates that Mississippi Power Be Overruled.

In its review of the factors and issues involving the determination of supervisory status and "independent judgment" under the Act, the Board should take the opportunity to overrule its decision in Mississippi Power, as that overruling is mandated by the holding of Kentucky River, as failure to overrule this decision will only continue the confusion over supervisory status issues. First of all, separate and apart from Kentucky River, the Board had no reasoned basis to reverse its Big Rivers position in Mississippi Power. See Dolin, 18 Lab. Law. at 382. Indeed, just two days after the issuance of Kentucky River, the Fifth Circuit Court of Appeals held that certain utility workers were supervisors, reversing a Board order predicated on Mississippi Power. See Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 211 (5th Cir. 2001). The court there found the Board had no reasoned basis to reverse its Big Rivers position in Mississippi Power and that the latter decision was inconsistent with the still-governing law in most circuits. Id. at 210. According to the court, "Mississippi Power & Light is unreasonably inconsistent with previous precedent under the NLRA" (Id. at 208) and given the Board's "vacillation," "Mississippi Power & Light is entitled to little judicial deference." Id. at 210. The court rejected the Board's justification for the change in its position based on the modern work force and workplace changes that makes quasi-professionals and quasi-overseers more common because "[i]t is the specific facts, not the Board's perception of labor trends, that must determine how the relevant law applies." Id. Finally, the court rejected the Board's attempt in Mississippi Power to analogize the utility workers duties to those of charge nurses because the Board's argument was "rejected" by the Supreme Court in Kentucky River. Id. at 211.

A fortiori, Mississippi Power cannot stand now because it was based on the Board's categorical exclusion of "even critical judgment by employees based on their experience, expertise, know-how, formal training, or education" and Kentucky River rejected this categorical exclusion. See Dolin at 382-83 (citing Kentucky River, 532 U.S. at 714). Mississippi Power wrongfully discounted particular kinds of judgment and did not focus on the question of degree of judgment. Id. at 383. Thus, reversal is mandated because Mississippi Power, like the Board standard overruled in Kentucky River, is based on the Board's erroneous statutory interpretation of the term "independent judgment."

The argument that the standard in Mississippi Power is distinguishable from that used in Kentucky River because the former case focused on the application of "independent judgment" rather than its basis, should be rejected. While a distinction can be made between the act of directing employees as they go about their tasks and that of directing the tasks themselves, such a distinction was not made in Mississippi Power. See Dolin at 383.

This argument should be rejected as a basis for upholding Mississippi Power, however, because "it is not supported by the language of Mississippi Power itself." Id. at 384 (citing Public Serv. Co. of Colo. v. NLRB, 271 F.3d 1213, 1220 (10th Cir. 2001)). Mississippi Power specifically traced the standard it applied to the line of charge nurse cases overturned by Kentucky River. Moreover, this argument is more properly applied to the interpretation of what "responsibly to direct" means, rather than to the interpretation of independent judgment. Id. Yet the Board in Mississippi Power "specifically recognized that the [individuals] at issue did assign and direct field employees, focusing instead on the question of 'independent judgment.'" Id. (citing Public Serv. Co. of Colo. at 1220). Thus, the Board's finding in Mississippi Power that the utility dispatchers were

not supervisors "was by necessity based on the very categorical distinction struck down by the Supreme Court" in Kentucky River. Id.

Whether any group of professional, technical, quasi-professional, or quasi-overseer employees are supervisors must now be decided simply by determining whether the three tests for supervisory status are satisfied. Id. As to the second test of "independent judgment," the focus must be on the degree of judgment, not the source of the judgment. It must not categorically exclude any particular kind of judgment, namely "ordinary professional or technical judgment in directing less-skilled employees to deliver services." Id. Contrary to the holding of Mississippi Power, professionals, technicians, and "quasi-professionals" and "quasi-overseers" must therefore be found Section 2(11) supervisors when they exercise judgment that is significant and only loosely constrained by their employers in directing less-skilled employees to deliver services, even if the source of the judgment exercised is based on their "experience, expertise, know-how, formal training, or education." Id.

III. CONCLUSION

It is clear from the Supreme Court's holding in Kentucky River and other decisions, both from the Supreme Court and from the courts of appeals, that the Board's historical interpretation of "independent judgment" and supervisory status has been too narrowly applied. As such, and in reliance upon those decisions, ARTCO respectfully requests that the Board find that the putative supervisors in question in Oakwood Healthcare, Golden Crest Healthcare, and Croft Metals, Inc., using the criteria advocated by the Supreme Court and the courts of appeals, be found supervisors under the Act.

In doing so, the Board should overrule its holding in Mississippi Power, as the reasoning of that decision is contrary to the Supreme Court's holding in Kentucky River.

Furthermore, the Board should decide that, when determining whether a putative supervisor is exercising "independent judgment," it should look at whether (1) the putative supervisor is taking an action based upon personal knowledge, training or experience; and (2) the putative supervisor's decision to take such action is based upon at least some subjective criteria (regardless of any policies or procedures which may limit the options available). If both those factors are in the affirmative, then the putative supervisor should be found to have engaged in "independent judgment."

The Board should also find that the terms "assign" and "direct," while not synonymous, are closely related, and that many times the term "direct" will encompass the term "assign."

It should also find that the meaning of the word "responsibly" in the statutory term "responsibly to direct" mean that the putative supervisor is held responsible or accountable for the direction of employees, and that the distinction between directing "the manner of others' performance" and directing "other employees" is a tenuous distinction at best, and, if such a distinction is to be made, it should be based upon the use of independent judgment in the putative supervisor's direction of other employees.

The Board should find that there is no tension between the Act's coverage of professional employees and its exclusion of supervisors, as the two terms are not mutually exclusive. One can be a professional and yet be a supervisor, depending upon the criteria for determining supervisory status in the Act.

The Board should find that it is appropriate when determining the status of part-time supervisors (those who hold supervisory roles and non-supervisory roles at different times) to examine whether the putative supervisor holds the position where supervisory authority is present

on a "regular and substantial" basis, and also should find that the rotation of employees into supervisory roles does not change this analysis.

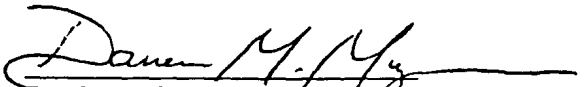
The Board should only examine recent developments in management to the extent that they impact the authority of the putative supervisor to engage in one or more of the twelve listed supervisory indicia, his exercise of independent judgment, or his authority to act in the interest of the employer, and any analysis in this regard should focus on the putative supervisor rather than the rank-and-file employees.

The Board should find that the primary distinction between genuine supervisors and "straw bosses, leadmen, set-up men and other minor supervisory employees" is the exercise of independent judgment, and, in some cases, the responsibility management has delegated to the putative supervisor for him to direct other employees.

Finally, the Board should continue to consider secondary indicia in determining supervisory status when doing so sheds light upon whether the putative supervisor in question (1) possesses the authority to engage in one of the twelve listed supervisory indicia in the Act; (2) exercises independent judgment in using this authority; and (3) holds such authority in the name of the employer.

Respectfully submitted,

AMERICAN RIVER TRANSPORTATION COMPANY



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CERTIFICATE OF SERVICE

I certify that, pursuant to NLRB Rules and Regulations Section 102.114(e), I caused a true and correct copy of the foregoing **Amicus Brief of American River Transportation Company** to be served via private overnight delivery service the following individuals on September 18, 2003:

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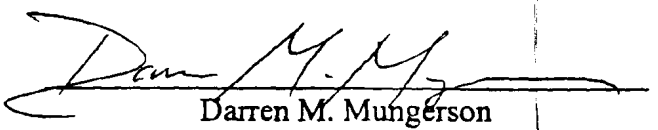

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